In the Supreme Court of the United States

October Term, 1919.

No. 19.

THE CUYAHOGA RIVER POWER COMPANY,
Appellant,

vs.

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY and THE NORTHERN OHIO POWER COMPANY,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF FOR APPELLEES.

S. E. TOLLES,
F. H. HOGSETT,
JOHN E. HORLEY,
Counsel for Appellees.

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Appellant,

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Appellees.

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STATEMENT OF THE CASE.

This cause comes before this Court on an appeal by The Cuyahoga River Power Company, plaintiff below, from a decree entered in the District Court of the United States for the Northern District of Ohio, dismissing the plaintiff's bill of complaint. A motion to dismiss (record, page 36) was sustained by the District Court and final decree entered directing a dismissal of the bill for the reasons stated in the opinion of the court, which opinion sustained the motion upon the ground that the facts set up in the bill did not entitle the plaintiff to the equitable relief demanded, (Opinion of Judge Killits, record, page 26).

The rights and claims asserted by the appellant and involving most of the facts set forth in the bill of complaint, have been before this Court in several other cases heretofore decided, namely *The Cuyahoga River Power Company vs. City of Akron* 240 U. S. 462; *The Cuyahoga River Power Company vs. The Northern Realty Company et al,* 244 U. S. 300, and *Sears, Trustee, vs. City of Akron,* 246 U. S. 242.

The allegations of the bill of complaint in this case may be briefly summarized as follows.

The plaintiff was incorporated as a hydro-electric power company under the general laws of the State of Ohio contained in Sections 10128 to 10134 of the Ohio General Code, for the purpose of building, maintaining and operating a system of dams, canals and locks in the Cuyahoga River and the erection of plants for the utilization of water power for the generation of electricity for light, heat, power and other purposes.

The original articles of incorporation, which were filed May 29th, 1908, specified that the improvements to be constructed by it should begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River, below the City of Akron, Summit County, Ohio, and extend along the Big Cuyahoga River through the County of Summit to the point where the Big Cuyahoga River crosses the line between Summit and Portage Counties, but by later amendment filed in 1912 the territory of operations was extended to include seven counties covering the watershed of a large part of northeastern Ohio.

The bill avers that by the fact of said incorporation "a contract was made between the State of Ohio and the plaintiff, whereby the state granted to the plaintiff a right of way along the Cuyahoga River between the points mentioned and a vested right and franchise to

construct, maintain and operate within the limits of said right of way a hydro-electric plant for the development of electric energy from the waters of the River."

On June 4th, 1908, plaintiff's Board of Directors adopted a plan for the development of hydro-electric power from the waters of the Cuyahoga River and located its proposed improvements upon several parcels of land which were declared to be necessary for the purpose of its organization, and which the bill avers were thereby appropriated for said purposes." (Par. Fifth of Bill, record, page 2).

A copy of the resolution is marked "Exhibit A" to the bill (record, page 16) and three certain parcels of land, one of forty acres designated the *"Everett parcel"* one of three-tenths of an acre designated the *"A. B. and C. parcel"* and a small parcel designated the *"Sackett parcel"* are (with other lands) described therein. The three parcels referred to are described as constituting a part of the bed and banks of the Cuyahoga River "at the lower end of the plaintiff's * * * right of way".

Title to the so-called Everett parcel of forty acres was then in Henry A. Everett (Mr. Everett being at that time an official of The Northern Ohio Traction and Light Company). The A. B. and C. parcel of three-tenths of an acre was then owned by The Northern Ohio Traction and Light Company, having been conveyed to it by The Akron, Bedford and Cleveland Railroad Company by deed dated December 29th, 1902 (The Akron, Bedford and Cleveland Railroad Company being one of the interurban railroad companies acquired by The Northern Ohio Traction and Light Company system). Subsequently The Northern Ohio Traction and Light Company acquired title to both the Everett parcel and the Sackett

parcel and at the time of the filing of the bill was the owner in fee of all three parcels, the bill reciting that Everett conveyed the Everett parcel to The Northern Realty Company on December 20th, 1910, the Realty Company conveying said parcel on January 31st, 1911, to The Northern Ohio Power Company, which on July 18th, 1911, purchased the Sackett parcel and on February 24th, 1914, conveyed both the Everett and Sackett parcels to The Northern Ohio Traction and Light Company (Pars. eighth and ninth of the bill, record, pages 4 and 5).

The defendant, The Northern Ohio Power Company, was incorporated January 31st, 1911, under the same Sections of the Ohio General Code governing the incorporation of the plaintiff, its articles of incorporation also specifying the Cuyahoga River as the stream upon which its proposed improvements were to be constructed. The property rights and franchises of The Northern Ohio Power Company were, in February, 1914, conveyed and transferred to the defendant, The Northern Ohio Traction and Light Company pursuant to the authority of an order of the Public Utilities Commission of Ohio, said order and the petition upon which the same was granted being annexed to the bill as Exhibits "B" and "C" (record, pages 23 and 28), by which petition and order it appears that the moneys theretofore expended by The Northern Ohio Power Company for the erection of power plants upon the property were advanced by The Northern Ohio Traction and Light Company.

The bill goes on to aver that upon the adoption of the resolution by its Board of Directors above referred to, the plaintiff on June 5th, 1908, commenced a suit to

condemn and appropriate the parcels of land described in said resolution and procured service of process upon The Akron, Bedford and Cleveland Railroad Company, Fannie V. Sackett and Henry A. Everett, and upon The Northern Ohio Traction and Light Company as a claimant of some interest in the property sought to be condemned, the further averment being that "said appropriation suit was continuously pending until a date subsequent to July 18, 1911; but * * * was not pressed for trial * * * until January, 1911 * * *." It should be observed therefore that there is no showing on the face of the bill that this appropriation suit of June, 1908, was pending at the time of the filing of the bill herein or that it had been determined in plaintiff's favor. The fair inference from the pleading is that this appropriation suit has either been determined adversely to the plaintiff or else allowed to lapse.

As a matter of fact it was dismissed by the plaintiff in 1911 as appears from the record of the *Northern Realty Company case,* filed in this Court, hereinbefore referred to. (Record pages 3, 4 and 9 in case No. 342, Oct. term, 1916.)

It is further averred that on January 20th, 1911, the plaintiff instituted in the Summit County Probate Court another suit to condemn and appropriate the *Everett* and *A. B. and C. parcels,* in which suit the sole defendant was said Realty Company. Inasmuch as the bill shows that the Realty Company did not then or ever own the A. B. and C. parcel, it is clear that this appropriation suit would affect only the Everett parcel. As to this suit the averment of the bill is that it has been diligently prosecuted and is now pending undetermined in the Supreme Court of the United States, having been carried by the plaintiff to the United States Supreme Court by

writ of error from the Court of Appeals of the State of Ohio. Although the bill does not so aver, we believe that this Court will take notice of the fact that this appropriation suit against the Northern Ohio Realty Company and to which The Northern Ohio Traction and Light Company was made a party defendant, has been determined adversely to the plaintiff by this Court, *Cuyahoga River Power Co. vs. Northern Realty Co.*, 244 U. S. 300, so that at this time the only appropriation suit which the bill avers as pending has now been definitely concluded as denying plaintiff's right to appropriate the land in question from the defendant.

The bill further avers that between January 31st, 1911, and February 24th, 1914, (on which date The Northern Ohio Power Company transferred the Sackett and Everett parcels to The Northern Ohio Traction and Light Company) there were erected upon the Everett and Sackett and A. B. and C. parcels certain power plants of large capacity, involving the use of the waters of the Cuyahoga River, these power plants being now used by The Northern Ohio Traction and Light Company for the generation of electric current for its purposes; that the Traction Company has spent large sums of money for the construction of these plants from the proceeds of securities issued by it under authority of the Public Utilities Commission of Ohio and is about to construct extensive additions thereto and expend further large sums from the proceeds of further securities authorized by said Commission and which are to be secured by a lien upon the properties in question (record, page 10).

It is averred that all the acts of the defendants with respect to the acquisition and improvement of said parcels since June 5th, 1908, have been performed with

knowledge of plaintiff's rights and franchises and with knowledge that such acts would interfere with the exercise of its rights; that the defendant's use of the three parcels in question "makes it impossible for the plaintiff to occupy its right of way or exercise its franchise or carry on its corporate purpose or attain its corporate objects" and that, "if the defendants continue their use of said parcels, the State's grant and command to the plaintiff to develop hydro-electric power from the waters of said river will be nullified" (Bill, Par. eighteenth, record, pages 10 and 11).

It appears from the bill that the defendant, The Northern Ohio Traction and Light Company, is an interurban and street railway company, incorporated November 24th, 1902, and is engaged in the business of operating lines of electric railway through and between the cities of Cleveland and Akron and other towns and villages in the vicinity thereof, the purposes named in its articles of incorporation being set forth in paragraph fourteenth of the bill (record, pages 7 and 8).

The bill states however that the defendant Traction Company has not and never has had

> "any corporate power or authority or any right or franchise to exercise the power of eminent domain, for the purpose of acquiring power houses or the lands necessary therefore, (except, etc.) * * *; and that said Traction Company's use of said Everett, Sackett and A. B. and C. parcels, and each of them, is and always has been a private use, and not a public use." (Par. sixteenth, record, page 9).

It is averred, however, that the defendant Traction Company claims and asserts that its acts with reference to the acquisition and use of the three parcels of land in controversy are being had in the exercise of rights conferred upon it by the State of Ohio and that it further

claims that its use of said parcels is a public use and that for that reason said parcels cannot be taken or appropriated by the Plaintiff (Bill, par. seventeenth, record, pages 9 and 10).

In an attempt to found its jurisdictional claim plaintiff further, in Par. Nineteenth of its bill (record, page 11) avers that its said right of way and franchises are contracts and property rights; that defendant's use of the three parcels of land in controversy ousts the plaintiff from its "right of way" and deprives it of its said "right of way" and franchises; and it is claimed that such use by the defendants is an appropriation to defendant's use of such "right of way" within the meaning of Section 5 of Article 12 of the Constitution of the State of Ohio, and

> "amounts to and is a taking and deprivation of its property for a *private use* and without compensation and without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and also an impairment of the contract of the plaintiff with the State of Ohio within the meaning of Section 10 of Article 1 of said Constitution of the United States."

The bill closes with a conclusion of the pleader that by reason of the defendants' acts as averred, the plaintiff's contracts with the State of Ohio are being impaired by the laws of said state, and the acts and doings of the defendants under color of authority of such laws and under and as an assertion of power from said state are all in contravention and violation of Section 10 of Article 1 of the Fourteenth Amendment of the Constitution of the United States.

The bill then prays in substance that plaintiff's alleged contract and property rights be established and

adjudged by the court and that the defendants be enjoined from in anyway appropriating, trespassing upon, interfering with or impairing or injuring any such alleged rights of the plaintiff, and particularly be enjoined from using the three parcels of land in question or further improving said parcels or placing any lien or encumbrance thereon under the authority of the above mentioned order of the Public Utilities Commission of Ohio, and from asserting that their use of the parcels referred to is a public use, or in any other manner clouding the title of the plaintiff to its alleged right of way and franchises, or interfering with the exercise of its corporate rights, including the right to acquire by the exercise of the power of eminent domain an absolute title to and ownership of said parcels. Plaintiff further asks that the defendants be required to either remove the structures upon the premises described or to grant and convey such structures to plaintiff for use by it in connection with its rights and franchises, and for a receiver to take possession of such structures and for an accounting and damages. (record, pages 13 and 14).

It will be seen, therefore, that the substance of the claim made in the bill is:

That the plaintiff was incorporated under the general laws of the State of Ohio in 1908, to construct and develop a hydro-electric property within certain geographical limits, and, in fulfillment of its objects, was authorized by the state to exercise the power of eminent domain;

That by purely intra-corporate acts it determined to acquire by condemnation or otherwise certain property which it deemed necessary to carry out its plan of development, including the three parcels of land in question;

That condemnation suits instituted by it in the proper state court for the appropriation of these parcels have either been allowed to lapse or have been determined adversely to it and that it has never been finally decreed to have the right to appropriate these parcels or any of them and has never paid to the defendants or any prior owner of the parcels compensation therefor;

That the defendant Traction Company, operating a system of street and interurban railroads in the territory concerned, but, as averred by the bill, without power of eminent domain to acquire lands for power house purposes, has acquired and is now the legal owner of said parcels, and, at the cost of several million dollars, has erected large power plants thereon for the supply of electric current for its lines;

That this use, although asserted by the defendants to be a public use, is by the allegations of the bill averred to be strictly private use of the property.

On these facts the plaintiff asks the court to enjoin the defendants from in any manner using or improving the property and asks that the power plants erected thereon be conveyed to it and a receiver appointed to take possession thereof pending such conveyance.

ARGUMENT.

I.

Incorporation under the general statutes of Ohio covering the incorporation of hydro-electric companies did not constitute a contract with the State or confer any exclusive franchise rights.

The claim of the bill is that

"by said incorporation a contract was duly made and entered into between the State of Ohio and the

plaintiff wherein and whereby said state duly granted to the plaintiff a right of way over and across said Cuyahoga River between the above mentioned termini and a vested right and franchise to construct, maintain and operate within the limits of said right of way a hydro-electric plant for the development of electric current and energy from the waters of said River" (Bill, par. third, record, page 2).

We submit that no such grant or contract arises from the fact of incorporation. In the first place it is clear that any grant of corporate powers in Ohio is subject to amendment or repeal and that no irrevocable privileges or immunities can be granted. The Ohio Constitution provides:

"Article I, Section 2. No special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly."

"Article XIII. Section 1. The General Assembly shall pass no special act conferring corporate powers."

"Article XIII. Section 2. Corporations may be formed under general laws; but all such laws may from time to time be altered or repealed * * *"

The Supreme Court of Ohio has said, *State ex rel vs. City of Hamilton,* 47 O. S. 51,, at page 74, referring to the above constitutional provisions:

"The constitutional provisions entered into the general law, and operated as to all corporations organized under it, in the same manner as a reservation to the legislature embodied in a special charter. Such reservation in a special charter or under a general law, negatives an intention on the part of the legislature to confer irrevocable rights upon the corporators."

To the same effect is the decision of this Court in *Hamilton Gas Light Co. vs. Hamilton City,* 146 U. S. 258, the court in the opinion by Mr. Justice Harlan (page 270) saying:

> "This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligations of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

This principle has been repeatedly affirmed by this Court. Thus in *Calder vs. Michigan,* 218 U. S. 591, in which the Grand Rapids Hydraulic Company claimed that its constitutional rights were impaired by repeal of its charter, the court after pointing out the power of amendment of repeal reserved in the charter held (syllabus) that:

> "A corporation contracts subject, and not paramount to, the reservations in its charter and cannot by making contracts or incurring obligations, remove or affect such reservations."

And in *Ramapo Water Co. vs. City of New York,* 236 U. S. 579, where the Water Company sought to restrain the

City from proceeding with the construction of a water system, it was held (syllabus) that:

> "Where the constitution of the state reserves the right to do so, the charter of a corporation may be repealed without impairing the obligation of a contract."

And at page 583 the court say:

> "The charter of the company could of course be repealed without impairing the obligation of a contract as the right was reserved, as usual, in the constitution of the state."

It is further true that any rights which may have been acquired under the Power Company's charter were taken, not only subject to all subsequent legislation, but especially to all general legislation existing at the date of incorporation.

Lehigh Water Co. vs. Easton, 121 U. S. 388.

And this principle has been specifically applied by this Court to the taking of water for a municipal water supply as affecting water power companies.

St. Anthony Falls Water Power Co. vs. Water Comm. St. Paul, 168 U. S. 349.

There is, however, nothing in the general legislation under which the Power Company was incorporated that purports to confer any exclusive rights or any vested right or franchise to special or exclusive privileges in any river, stream or other waters of the state to companies organized thereunder. These laws authorize the formation of such corporations but make no direct or definite provisions as to any specific locality in which they are to operate. There is no requirement that, having been formed, they shall perform any public service whatever. They are free to carry out the purposes named in their articles, or such part thereof as they may

deem advantageous, as they see fit. The filing of articles of incorporation by one set of incorporators would not prevent the incorporation of another company with like purposes, nor would the designation of certain termini or the specification of a certain river in the articles of incorporation of one company preclude the organization thereafter of another company naming the same river for its field of operations.

The incorporators, to give a necessary definiteness to its purposes for indicating what shall be *intra vires* and *ultra vires*, recite in general language where the corporation is to conduct its operations, but these purposes may be enlarged or diminished or wholly unperformed. In this particular case the original articles of incorporation of the Power Company state in substance that it was formed for the purpose of building and operating dams in the Cuyahoga River, erecting a power plant and constructing line or lines of poles for transmitting electricity and specified that its improvements were to be between certain points on the Cuyahoga River. This might involve a very extensive water power development or a very small one. The company might proceed to develop and use all of the water power of the river between those points, or but a very small part thereof as it should see fit, and it might erect one dam or several.

It seems to us impossible to read into the general language of this statute any intention of conferring any exclusive rights upon corporations which may be organized under it and there certainly cannot be read into this general law the intention to confer any such exclusive rights of the extravagant character claimed by appellant.

> "An exclusive right to enjoy a certain franchise is never presumed, and unless the charter contains

words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed."

Pearsall vs. Great Northern Ry., 161 U. S. 646, at page 664.

See also *Bank of Commerce vs. Tennessee*, 163 U. S. 416, 424.

It is shown by the bill that The Northern Ohio Traction and Light Company filed its articles of incorporation in 1902 as a street and interurban railway company and that the defendant, The Northern Ohio Power Company filed articles as a hydro-electric company in 1911. It certainly cannot be contended that the incorporation and empowering of the Traction Company in 1902 impaired any contract rights which plaintiff claims to have acquired under its incorporation in 1908. The only assertion of state impairment of contract obligation possible under the averments of the bill therefore is that by the incorporation of The Northern Ohio Power Company in 1911 and the subsequent conveyance of its property and franchises to the Traction Company under authority given by the State Public Utilities Commission, plaintiff's alleged contract of 1908 with the state is impaired. The charter, however, of The Northern Ohio Power Company in 1911 and the subsequent transfer of its property to the Traction Company did not for the reasons above stated impair any contract rights of the plaintiff. Plaintiff's incorporation gave it no exclusive franchise rights to the development of water power in the territory set forth in its articles and did not in any way preclude the incorporation of other companies who might desire to enter said territory.

Further argument on this proposition is, however, unnecessary for the claims of the defendant in this respect have been definitely disposed of by the decision of this Court in *Sears, Trustee vs. City of Akron,* 246 U. S. 242, where the same claim of contract right and of alleged impairment thereof by the state was asserted. The court on page 248 of the opinion by Mr. Justice Brandeis says:

> "First: As to the alleged impairment of contract: Plaintiff contends that the incorporation of the company in 1908 under the general laws constituted a contract by which the state granted it the right to construct and operate a power system in the places designated in the certificate and the right to take property for that purpose and to have the water flow past that property uninterrupted and undiminished; and that the ordinance of 1913 is a law which impairs that contract in violation of Article I, Section 10, of the Federal Constitution. It is clear that the contract right created by incorporation alone was not illegally impaired by the ordinance, because there was no contract by the state with reference to the water rights. Incorporation did not imply an agreement that the quantity of water available for development by the company would not be diminished. *St. Anthony Falls Water Power Co. vs. St. Paul Water Commissioners,* 168 U. S. 349, 371. The so-called charter simply conferred upon the company the power to take lands necessary for, and to construct thereon, the dams, locks, and other parts of its plant. If by purchase or by right of eminent domain under the charter powers the company becomes the owner of riparian lands, it acquires the riparian rights of former owners; or it may otherwise acquire from the owners specific rights in the use and flow of the water. But these would be property acquired *under* the charter, not contract rights expressed or implied in the grant of the charter.

Furthermore, the contract inhering in the charter (as distinguished from property acquired under the charter) was subject to the state's reserved power to amend or repeal, as provided in Art. XIII, Section 2, of the Ohio constitution. *Ramapo Water Co. vs. City of New York,* 236 U. S. 579, 583. The act of 1911, under which the city proceeded, may be treated as an amendment of the company's charter making its rights subject to those of the city, if that is necessary to justify the proceeding of the city, which the act authorized. See *State vs. City of Hamilton,* 47 Ohio St. 52, 74; *Hamilton Gas Light Co. vs. Hamilton City,* 146 U. S. 258; *Berea College vs. Kentucky,* 211 U. S. 45, 57."

This decision would seem to finally dispose of any such claim of contract impairment.

II.

The adoption by the plaintiff by private corporate act of plans for the development of its water power project, locating by resolution its proposed improvements upon designated parcels of land, gave plaintiff no property interest in the lands in question, or right to prevent any lawful use thereof by the owner.

The plaintiff claims that by the adoption of the plan for its proposed water power project and the resolution of its Board of Directors locating its proposed improvements upon specifically described parcels of land, it acquired a vested property right in the location adopted and an actual interest in the lands in question, such that a court of equity should prevent their use and enjoyment by the defendant Traction Company, which is the owner of the legal title and in possession of the property. In

support of this claim it cites a line of authorities in which Railroad Companies or other similar public utility companies having the right of eminent domain have been held to have a preferential right to a definitely located route as against subsequent location on the same property by rival companies. This phase of the matter it is said was not decided by this Court in the *Sears case,* the following language from the opinion of the court on page 250 being cited:

> "* * * Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider." (*Sears, Trustee, vs. City of Akron, supra"*).

Undoubtedly, as a mere matter of expediency between railroad corporations or other similar *quasi* public corporations having the right of eminent domain, the corporation which first commences the exercise of the right to appropriation by proper proceedings should be held, unless precluded by dilatory conduct or other sufficient reason, entitled to retain the property appropriated against a later locator or appropriation to public use by another company. Otherwise there might be no end to conflicting locations or appropriations by such corporations.

In some states the adoption of a specified route by corporate resolution, followed, in some jurisdictions where the statutes require it, by the filing of a map in a public office, has been held to be in itself an act of appropriation giving rise to such preferential right. This, however, would not seem to be the law in Ohio and in this connection we quote from the opinion of the District

Court for the Northern District of Ohio in the case of *Sears, Trustee, vs. City of Akron,* rendered by Mr. Justice Clarke, then District Judge, as follows (the opinion may be found in the printed record of *Sears, Trustee, vs. City of Akron,* No. 105, Oct. term, 1917, on file in this Court):

> "In Ohio the declaration upon the private records of a corporation of an intention to construct an improvement upon or over any lands without further action taken, or payment made does not give to the plaintiff any title or right whatever legal or equitable in the lands embraced within such paper scheme. This is distinctly the settled law of Ohio, and the best expression of it is, I think, to be found in the case of *Columbus, etc., Co. vs. T. & O. C. Ry. Co.,* 32 W. L. B., 186. This is a Common Pleas Court decision, but it is well worked out and the absence of decision by higher courts on a question which must have frequently arisen is of itself strongly confirmatory of its authority as an expression of the accepted law of the state. The court says:
>
> 'But the grant, by articles of incorporation to a railroad company of a right to construct a road is afloat; it attaches to no specific lands until the line of the road is sufficiently fixed by purchase of the land, or by condemnation proceedings and acceptance of the land condemned. Even after the land is condemned the Railroad Company may elect not to pay the price and accept the land. The fact that a Railroad Company has surveyed and staked a line upon certain grounds does not conclude it, why then should it conclude anybody else? The company may survey and stake more than one line and by comparing the cost and advantages of each of them, determine upon which it will build, but the line is not definitely established until the land is condemned, paid for or accepted, or purchased by agreement.'

So in *State of Ohio, ex rel vs. Cincinnati,* 17 O. S., 103, the court states what is well known to this Court to be the opinion of the profession of the state that 'no appropriation of the lands of the relators could be completed, no title from them could be acquired and no incumbrance could be imposed on their estate by the railroad company until the amount of compensation fixed by the findings of the jury was paid in money or secured to be paid, by a deposit of money.'

"The plaintiff has no pow of eminent domain greater or other than a railroad company has. In the State of Ohio there is not now and never has been any statute requiring a corporation desiring to exercise the right of eminent domain to file in any public office a map or survey of the route or plan of the improvement adopted by the Company, so that the rule that land owners or other corporations are in any wise estopped or their property encumbered by the mere private resolution of a company possessing the power of eminent domain has never prevailed in this state as it has in some other states."

It is the organic law of Ohio that "private property shall ever be held inviolate, but subservient to the public welfare" and that "where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury. * *." (Ohio Constitution, Article I, Section 19.)

The Ohio Supreme Court has fully recognized the constitutional requirement in the case of *Ohio ex rel vs. Cincinnati,* 17 O. S., 103, cited in the opinion of Judge Clarke above quoted, and in the case of *Wagner vs. Railway,* 38 O. S., 32. In the latter case the court held that not until there is a judgment confirming the verdict of the jury in appropriation proceedings is there an appro-

propriation and the corporation entitled to possession. At page 36 the court say:

> *"No right of possession is divested until the appropriation is completed. The owner's right to dominion over his land is as inviolable as his ownership or title.* * *. To deprive the owner of his right of possession, until the appropriation is made, would be as obnoxious to the constitution as to take the title. * * *. *Again, the rights of the parties are mutual. Whenever the corporation is entitled to take the land, its former owner is equally entitled to the money. The right to the money accrues eo instanti with the right to take the land, otherwise compensation would not first be made."*

The peculiar necessity of this rule under the Ohio Statutes is apparent upon an examination of the appropriation statute, which permits abandonment of proceedings by the petitioner in the following langauge:

> "The corporation may abandon any case or proceeding after paying into court the amount of the defendant's costs, expenses and attorney fees, as found by the court." (Ohio Gen. Code, Section 11060.)

Defendant Traction Company is shown to be the private owner of certain real property. Plaintiff is authorized by the legislature of Ohio to appropriate property for its corporate uses in the manner provided for corporations generally (Ohio Gen. Code, Section 10129). It claims to have instituted certain proceedings to appropriate three parcels of land now owned by defendant Traction Company. It does not show a determination of those proceedings in its favor, while as a matter of fact and from the records of this Court we know that of the two proceedings referred to, one has been dismissed by it and the other has been finally determined adversely to it. It does not show that it has paid or se-

cured by deposit of money the payment of compensation to any owner of any portion of the three parcels referred to. It is entirely manifest therefore that plaintiff is not entitled to possession of any portion of such property and therefore that it is not entitled to the relief which it asks.

In this view of the case the broad conclusions and claims of the bill of complaint shrink to their proper proportions.

The doctrine with respect to a preferential right in the first locator as between two rival companies is limited to cases arising between rival companies, each having the right of eminent domain and each seeking to appropriate the property in question to public use. The doctrine, we submit, has no application at all to such location by railroad or other public utility as affecting the use of his land by a private property owner or anyone holding land in a purely private capacity.

The averments of the bill are that the defendant Traction Company has not and never has had the right of eminent domain for the purpose of acquiring power houses or the lands necessary therefor and that the Traction Company's use of the parcels of land in question is and always has been a private use and not a public use (bill par. sixteenth, record page 9). On the plain averments of the bill therefore the Traction Company is in the position of a private land owner making private, and not public, use of his own property. There is no place, therefore, for the doctrine of preferential right as between rival companies, each having the right of eminent domain and each desiring to appropriate the property in controversy between them to a public use.

It is true that the bill avers that the Traction Company is asserting a claim that the property has been de-

voted by it to a public use and, therefore, cannot be taken from it by appropriation, but this averment can amount to nothing in the face of the plain allegations of the bill that the Traction Company has no right of eminent domain as respects the land in question and that its use thereof is entirely private.

It is apparently conceded by counsel for appellant in their brief that an owner of land may make such use of his land as he sees fit until actual appropriation thereof by proper proceedings and assessment of compensation is had, and that such use cannot be interfered with prior to such appropriation merely because the land is included in some location adopted by some Company having the right to appropriate it. If this is true, can the fact that such private owner has made the assertion that his use is public give the locating company any higher or additional right in a suit brought to enjoin such use? If this were an action against John Smith, an individual land owner, for the purpose of enjoining such owner's use of his property because included in plaintiff's attempted location, it certainly would avail nothing to aver in the bill that the defendant claimed his use of the land to be a public use and that plaintiff had no right to take it from him, and such averment can certainly have no greater bearing here simply because the defendant appears to be an interurban railroad company. Plaintiff must certainly stand upon the allegations of its bill, that the use of the land is entirely private and that the defendant has no rights in the property other than those of a private owner.

It is claimed by appellant in its brief that this assertion of the Traction Company constitutes a cloud upon plaintiff's title and, therefore, forms a basis for equitable relief, and we will now consider this phase of the matter.

III.

The plaintiff is not entitled to the equitable relief sought for on the theory of quieting title.

The District Court below, as stated in appellant's brief, declared that it did not appear from the bill that the plaintiff's operations were at the present time interfered with in any practical way by defendant's use of its property, and that pending the time when the plaintiff should complete a condemnation proceeding it saw no reason why the Traction Company should not be permitted to use the land for its purposes and the court distinguished the *Binghampton Bridge Case,* 3 Wall 51, and *Hamilton, G. & C. Traction Co. vs. Hamilton & L. E. Transit Co.,* 69 O. S., 402, relied upon by the plaintiff, upon the ground that in those cases the question was "one of actual and present interference with the rights of the corporation in the operative enjoyment of the privileges of its charter." This view of the court is criticized by appellant upon the ground that "it loses sight of the practical difficulties thrown in plaintiff's way by the very fact that defendants are using the land for power development purposes and asserting that such use is a bar to plaintiff's right to acquire the land for itself." This it is said is an interference with and an invasion of plaintiff's rights because, counsel say, "how can the plaintiff as a matter of business judgment and common sense go ahead with the purchase of other lands, the construction of dams, machinery or appliances, when it is uncertain as to whether it will be able to obtain lands herein involved which are an essential part of the enterprise?" (Appellants' Brief, p. 53.) This assertion, therefore, of the Traction Company it is claimed constitutes a cloud upon plaintiff's so-called property rights,

is an actual invasion of such rights and forms a basis for the equitable relief asked.

Counsel on page 56 of their brief say:

> "The defendants may hold the land until condemned and may use it for any private use they please, but when they attempt to use it for a public use and assert and claim that their use is a public use which defeats the right of the first locator to appropriate it, they invade, take and destroy the franchise of the first locator, the plaintiff."

It being conceded in the bill that defendant's use of the land is a private use, it necessarily follows that, conforming to the above reasoning, the defendant's assertion constitutes the sole invasion of plaintiff's franchise. It is not the Traction Company's use of the land for power purposes that is complained of. This, it is alleged, is a private use. If a private owner or a mill company owned these lands and erected a power plant thereon the plaintiff would have no right to interfere with such use, but, if such owner asserts that such use is public and denies the plaintiff's right to take the lands away from him by condemnation, such assertion immediately gives rise to a right in the plaintiff to enjoin the owner's use and take away the lands from him in advance of any condemnation thereof. The mere statement of such a proposition would seem to show its absurdity.

It should be borne in mind that the purpose of the bill is not merely to adjudicate whether or not the defendant's assertion is right or to enjoin the defendant from making such assertion (which we submit would be merely the trial of a moot question), but the bill seeks to enjoin the defendant's use of its lands, which use is averred in the bill to be a strictly private use, and to

actually take the property away from the defendant by requiring its conveyance to the plaintiff by mandatory injunction and the appointment of a receiver to forthwith take possession thereof.

We submit that a suit to quiet title can be brought only by one in possession and being either the owner of lands or having some actual interest therein, such as the leasehold title of a lessor giving the right of possession. This at least is the rule in the Federal Courts, *Whitehead vs. Shattuck*, 138 U. S., 146; *Boston etc. Mining Co. vs. Montana Ore Co.*, 188 U. S., 632. No case is cited by appellant where a strictly lawful use of one's land by the owner thereof can be enjoined by one having no legal or equitable title to the lands or in any way entitled to the possession thereof merely because of some assertion of right on the part of the owner which, if ultimately established, might interfere with the accomplishment of some project of the plaintiff, in the carrying out of which project the plaintiff may have the right to ultimately acquire the lands in question.

In the case of *Lancaster vs. Kathleen Oil Co.*, 241 U. S., 551, cited by appellant, plaintiff had a lease of the lands and was entitled to immediate possession and the exercise of its rights under the lease for the mining and producing of oil and gas on the property, and was therefore held to be entitled to enjoin the defendant, who had taken possession of the land under an invalid lease, from operating thereunder. In this situation plaintiff's legal remedy of ejectment was quite naturally held to be inadequate and plaintiff's rights and the protection thereof by injunction quite properly the subject for equitable consideration.

In the case of *Bass vs. Metropolitan West Side El. R. Co.*, 82 Fed. 857, cited in appellant's brief as being a

case in which a Railroad Company was enjoined from using certain premises for railroad purposes although it was lawfully in possession thereof as lessee, it appears that plaintiff was the owner of the property and that the use of the property by the Railroad Company as lessee in the particular respect complained of was in violation of the provisions of the lease. The Railroad Company's act constituted a present infringement of plaintiff's rights and the fact that this might work a forfeiture of the lease and entitle the plaintiff to legal remedies would not preclude his resorting to equity for the enforcement of his rights as owner.

So in the cases of wrongful taking or appropriation of lands by a Railroad Company or other corporation from an owner, the existence of legal remedies by way of a suit for damages or a suit to compel appropriation will not preclude the owner from resorting to equity to enjoin such wrongful invasion. None of these cases have any application to the case at bar.

We submit that the view expressed by the District Court below, that it does not appear from the bill that the plaintiff's operations are at the present time interfered with by defendant's use of its property, is entirely justified by a careful analysis of the bill. Although it is alleged in the bill (par. eighteenth, record pages 10 and 11) that the defendant's use of these parcels "makes it impossible for the plaintiff to exercise its franchise or carry on its corporate purposes and that, if the defendants continue their use of said parcels, the State's grant and command to the plaintiff to develop hydro-electric power from the waters of said River will be nullified and the right of way and other property, rights, powers, privileges and franchises so granted to, acquired by and vested in the plaintiff as hereinabove alleged will

be permanently appropriated to the use of defendants," this conclusion is not in any manner supported by any averment of facts contained in the bill as distinguished from mere legal conclusions.

Confessedly, the plaintiff has no right to the possession or use of these parcels until it acquires them by purchase or condemnation from the owner. Until such time, therefore, no lawful use thereof by the owner can be truthfully said to interfere with plaintiff's franchise rights or prevent the exercise of any franchise rights by the plaintiff.

As we have heretofore shown, plaintiff acquired no exclusive franchise rights to the development of the waters of the Cuyahoga River by reason of its incorporation, and other property owners have the right to make use of these waters and possess and enjoy their own properties until such time as plaintiff shall have acquired them. So far as the plaintiff's charter is concerned, its exercise of any rights thereunder may involve a very extensive development of the River or a very small one and may be exercised in one locality or another within the general territory mentioned. The defendant is not preventing the plaintiff from going forward with the exercise of its franchise rights nor in any manner at this time interfering with or putting any obstacle in the way of its exercise of them, for when the plaintiff gets ready to appropriate this property in the ordinary method provided for that purpose, it would appear from the allegations of the bill that it can take the property, and no use which the defendant has in the meantime made of the property would in any way affect such right. Apparently, however, plaintiff has made no substantial progress since its incorporation in 1908 toward the exercise of its alleged franchise rights or the consumma-

tion of its grandios project of water power development, the exercise of its corporate powers having been devoted entirely to the institution of a large number of suits against persons and municipalities holding property on or making use of the Cuyahoga River.

The Court will perhaps recall that in its suit against the City of Akron, recently decided by this Court, (*Sears, Trustee, vs. City of Akron,* 246 U. S., 42), the plaintiff claimed that the City of Akron, in constructing its dam and other improvements in connection with developing the water supply of the City, had interfered with plaintiff's franchise rights and made it absolutely impossible for it to carry forward its project and had entirely nullified and made the project absolutely valueless. The City's rights however were upheld by the Court so that, if the allegations of the bill in that case are to be taken as true, plaintiff's project has already been made impossible of fulfillment and its alleged franchise rights entirely destroyed. However, we find it again in this action against the Traction Company asserting the franchise rights supposed to have been rendered valueless as the result of the previous litigation and claiming that the private use which defendant is making of its own property, and to which, concededly, the plaintiff has no present right of possession or enjoyment, is an interference with the same franchise rights and has again the effect of destroying them.

We submit that this use by the defendant is no present interference with or invasion of any rights which the plaintiff now possesses for the only right which the bill shows is the right to proceed with its proposed improvements and when it needs property therefor, owned by others, to acquire that property by purchase or condemnation, but the plaintiff says, quoting from page 53 of appellant's brief:

> "* * * The Court below criticized the plaintiff because so far it has not done much for the public by way of improving the water power of the river (Rec. p. 38)—quite unmindful of the fact that the cloud which the defendants' acts and claims have cast upon the plaintiff's right to proceed, and which the Court has refused by its decree to remove, is the very cause and reason why the plaintiff has been so far unable to enter upon actual performance of its public functions. It seems inconsistent and rather unfair for the Court thus to criticise the plaintiff for not proceeding and at the same time refuse to give it that protection from interference which alone will enable it to proceed. A clear title is the first requisite of any enterprise; and a reasonable certainty of the right to complete an undertaking is, in a very real and practical sense, the *sine qua non* of its commencement."

In other words, although the plaintiff may have done nothing itself toward the carrying forward of its enterprise and no one has actually interfered with any of its property rights or prevented it from proceeding with such enterprise, nevertheless, because certain property owners have made assertions that it had no right to take their property, such assertions constitute a cloud and make it, as a matter of policy, unwise to proceed until the right thus questioned has been adjudicated. This practical difficulty confronting it from the standpoint of business policy it is claimed entitles it to invoke the equitable jurisdiction of this Court. It appears, therefore, that this so-called cloud cast upon the enterprise forms the sole basis of its case, which must be sustained if at all, not on account of any present invasion of any actual property or franchise rights, but on the theory of a suit to quiet title.

In *Boston etc. Mining Company vs. Montana Ore Co.*, 188 U. S., 632, *supra*, the complainant, claiming to be the owner of certain mining properties, brought suit to enjoin the defendants from mining and extracting ores from the properties in question and sought to sustain the jurisdiction of the court by alleging that the defendants were asserting the right to take out the ore by reason of the claim that veins of ore comprised in certain neighboring mining patents owned by them apexed on complainant's property and that this involved the decision of certain matters in controversy involving the construction of statutes of the United States relative to purchasing and patenting mineral lands, and so presented a federal question. It was claimed that because of this assertion on the part of the defendants, the suit should be treated as one to quiet title and, as the question thus raised would involve the construction of the laws of the United States, the federal court therefore had jurisdiction. The lower court's dismissal of the bill for want of jurisdiction was sustained by this Court and Mr. Justice Peckham, in delivering the opinion of the court, has this to say in regard to federal jurisdiction on the theory of quieting title, which seems to us to be quite pertinent here: (Quoting from p. 640.)

> "It is urged, however, on the part of the complainant that its averments in regard to the jurisdiction of the court are necessary to be set forth as a part of its cause of action, and that they show that the appellees are questioning complainant's title and interfering with its enjoyment of its property right by asserting ownership to a portion of such claim of complainant based upon two government patents issued for the Rarus and Johnstown claims respectively, and although such assertion of ownership of the appellees is, as complainant avers, without legal

foundation, yet, for reasons stated in the bill, the consideration of which necessitates an examination of Federal questions, the case is in effect one to quiet complainant's title or to prevent an interference with its rights and property, and complainant avers that the allegations of jurisdiction relate to its cause of action; that they state the controversy existing between the parties as to its subject matter, not as anticipatory of the defence, but as establishing the complainant's right to have its title quieted.

But it is plain that the suit is not in truth a suit to quiet title. There is a cause of action alleged that is not founded upon any such theory, to prove which it is not necessary or proper to go into the defendants' title or to anticipate their defence to the cause of action alleged by the complainant. What is thereafter said is for the purpose of showing jurisdiction in the Federal court, not over an equitable cause of action in the nature of a bill to quiet title, but over a cause of action arising out of the laws of the United States; and the various mining laws of the United States are cited to show the truth of the assertion. It is also clear that jurisdiction in a Federal court cannot be predicated in this case upon an assertion that it is brought to prevent a multiplicity of suits. Even then the complainant's proof in the first instance would remain the same as already stated. The frequent trespasses, as alleged, of the defendants, by reason of which an equitable remedy by injunction is sought, might exist, and still it would not necessarily appear from the complainant's proof that the defendant's justification arose by reason of an alleged right under the Constitution or laws of the United States. That might appear in the defense, but would constitute no cause of action by complainant.

If, however, the bill is to be looked upon as one in the nature of a bill of peace or to quiet title, it is fatally defective in that respect. There are two distinct kinds or classes of bill of peace, or bills to quiet title, the one brought for the purpose of establishing

a general right between a single party and numerous persons claiming distinct and individual interests; the other for the purpose of quieting complainant's title to land against a single adverse claimant. In the second class the suit can be maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment, and in such case it is necessary to aver that the title of complainant has been established by at least one successful trial at law before equity will entertain jurisdiction. 3 Pom. Eq. Jur. 2d ed. § 1394, note 3, and 1 Pom. Eq. Jur. § 246.

This bill evidently would come under the second of these classes, and it is defective in not containing an averment that the complainant's title has been at least once successfully tried at law. On the contrary, it appears from the bill itself that an action at law has been commenced involving the same questions, but has not been tried.

It is also objected, that, as a bill of peace or to quiet title, it is defective, because there is no allegation that the complainant was in possession, which is necessary in such a bill. If not in possession, an action of ejectment would lie. The contention that under the Code of Montana a person not in possession may maintain an action to quiet title cannot prevail in a Federal court, unless it be alleged and proved that both parties are out of possession. *Whitehead vs. Shattuck,* 138 U. S., 146."

So far as the title to the actual land itself is concerned, it is manifest that the bill cannot be sustained as a suit to quiet title as the plaintiff is not the owner of the lands in question or in possession or even having the right to possession. Can it be sustained as a suit to quiet title to plaintiff's alleged franchise rights? Such a suit would certainly be an anomaly, but, even if it can be conceived that an action might lie in the nature of a suit to

quiet title where the subject matter involved was merely intangible franchise rights, we submit that the allegations of the bill here will support no such case or warrant a federal court's taking jurisdiction in equity.

It does not appear from the averments of the bill that anyone is at this time interfering with plaintiff's franchise rights or its exercise of them. The gist of the complaint when properly analyzed is the alleged assertion of the defendant that plaintiff has no right to take the lands away from it. In other words, it is said that when the plaintiff undertakes to appropriate these lands the defendant will then claim that it cannot do so because of defendant's public use of the property and that the defendant will set up this claim as a defense to such appropriation suit when brought, and that this, therefore, constitutes a cloud upon plaintiff's franchise. This, however, is merely pleading an anticipated defense and attempting thereby to obtain the jurisdiction of the federal court in thus setting up the alleged federal questions which would be involved in such defense. Jurisdiction cannot be obtained in this way under guise of a suit to quiet title when the necessary elements upon which any suit to quiet title is conditioned are not present. *Boston etc. Mining Company vs. Montana Ore Company, supra.*

We must confess to great difficulty in understanding the proposition of appellant's counsel that this action may be considered as a suit to quiet title to plaintiff's franchise. On page 6 of appellant's brief counsel say:

> "We hence desire to emphasize at the outset that we make no claim of any right to oust the defendants from their possession, or of any right on the part of the plaintiff to take possession in advance of actual payment of compensation. The relief to which we insist the plaintiff is entitled in this suit is a decree

establishing its title to its franchise, *i. e.*, establishing its right to proceed with its enterprise, and removing the cloud cast upon its title by the defendants' assertions and claims that the plaintiff's rights have been defeated by their own purchase and use of the land, by enjoining the defendants from using the land *for power-development purposes* and from asserting such use as a bar to the plaintiff's right to acquire the land by the orderly processes of condemnation."

It is of course manifest from the bill that the plaintiff is asking much more than a decree merely establishing its title to its franchise or removing the cloud cast upon this franchise by the defendants' alleged assertion. To adjudicate merely as to whether the defendants' assertion is right or wrong would, as we have heretofore pointed out, be deciding a purely academic or moot question. The real purpose of the plaintiff's suit however is to enjoin the defendants from using the land for power house purposes and there is even a prayer that the power plants be actually turned over to the plaintiff and that a receiver be presently appointed for the property.

To enjoin the defendant from using its own land for its own purposes, these purposes being admittedly lawful, amounts of course to the same thing as depriving it of possession and taking the land from it. To deprive an owner of all beneficial use of his land for the purposes for which it is adapted and has been improved, results necessarily in a taking of the property within the meaning of the constitutional prohibition of such taking without compensation first made therefor.

We are unable to understand how appellant can claim to justify any such "taking of property" in advance of a legal appropriation thereof and payment of compensation made upon any theory of an equitable suit to quiet title.

It cannot be sustained as a suit to quiet title to real estate, because, as we have seen, all the conditions necessary for such suit are wholly lacking.

It cannot be sustained as a suit to quiet title to a franchise, because no one is now interfering with the exercise of the franchise, and because it seeks not merely to remove the so-called cloud by decreeing the validity of the franchise rights said to have been questioned (which would be merely deciding a moot question) but seeks to take property from an owner by enjoining any beneficial use thereof for his own purposes.

Appellant further contends that because the condemnation suit which it must needs otherwise bring to acquire the lands, must be brought in a state court, its sole legal remedy is, therefore, available only in a state court, while it is the settled rule that in order to defeat the equity jurisdiction of the federal court the legal remedy must be one available in a federal court.

We submit that this rule of federal practice has no application to the situation here. The equity jurisdiction of a federal court which cannot be defeated by the existence of a legal remedy in the state court under the rule above quoted is only the equitable jurisdiction which a federal court would have whenever the established principles and rules of equity permit a suit of the character in question to be brought in that court. When that equitable jurisdiction under such established principles is shown to exist, then and then only the plaintiff cannot be deprived of its right to sue in equity by reason of the existence of some legal remedy under a state statute. *McConihay vs. Wright,* 121 U. S., 201; *Smyth vs. Ames,* 169 U. S. 466.

In *McConihay vs. Wright* the plaintiff brought suit to quiet title and had *under established equitable princi-*

ples the right to bring such suit, he being in possession of the land in question and the defendant, claiming an adverse title, being out of possession. It was claimed however that, inasmuch as a statute of West Virginia allowed an action of ejectment to be brought against one claiming title to land although not in possession, the existence of this legal remedy of ejectment allowed under the state statute defeated the equitable jurisdiction of the federal court. In this connection the court, quoting from page 205 of the opinion by Mr. Justice Mathews, said:

> "* * * The contention of the appellants, however, is that by the statute of West Virginia, the complainant might have maintained an action of ejectment. Reference is made in support of this contention to the West Virginia Code of 1868, c. 90, to show that an action of ejectment in that state will lie against one claiming title to or interest in land, although not in possession. Admitting this to be so, it nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and Acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. Bills *quia timet*, such as the present, belong to the ancient jurisdiction in equity, and no change in state legislation giving, in like cases, a remedy by action at law, can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress."

The principle governing equitable jurisdiction in a suit to quiet title which obtains in federal courts and

which, as we have seen, is conditioned upon the party bringing such suit being in possession of the land in question, is based upon the fact that, if out of possession, the ordinary legal remedy of ejectment would lie. This being so it would make no difference and would not enlarge the equitable jurisdiction of the federal court, if such action of ejectment should for other reasons, such as lack of diverse citizenship where no federal question is involved, need to be brought in a state court. In other words, the equitable jurisdiction of the federal court cannot be enlarged merely because legal remedies are only available in a state court. The rule referred to by appellant applies only to an attempt to deprive a federal court of equitable jurisdiction which would otherwise exist and thereby limit or restrict its jurisdiction because of the existence of some legal remedy under some special state statute.

We submit that there is no principle of equitable jurisdiction of the federal courts otherwise existing through which the property of an owner can be taken from him by a corporation in advance of the completion of condemnation proceedings and payment of compensation, and that this taking cannot be effected under the guise of a suit to quiet title and federal equity jurisdiction thereby acquired on the theory that the legal remedy of condemnation is available only in a state court.

IV.

Under the circumstances set forth in the Bill appellant cannot now resort to the equitable remedy of injunction here sought.

The plaintiff adopted the plan for its proposed hydro-electric project and adopted the appropriating reso-

lution set forth in the bill in June, 1908, and at once instituted appropriation proceedings against the owners of the lands in question, to which proceedings it made the Traction Company a party. The Traction Company at that time was the legal owner of the A. B. and C. parcel and claimed an equitable interest in the Everett parcel, legal title to which then stood in Mr. Everett, the then President of the Company. This appropriation suit the bill does not aver to be pending and it would be a fair implication from the pleadings that it has either been determined adversely to the plaintiff or has been allowed to lapse. As a matter of fact as above shown, this suit was long ago dismissed by plaintiff at the time it commenced the second proceeding next referred to.

In December, 1910, the Everett parcel was conveyed to The Northern Realty Company and in July, 1911, the Sackett parcel was acquired by The Northern Ohio Power Company, which in the same year took title to the Everett parcel from The Northern Realty Company and in February, 1914, conveyed both the Sackett and Everett parcels to the defendant, The Northern Ohio Traction and Light Company. In January, 1911, plaintiff commenced condemnation proceedings against The Northern Realty Company to appropriate the Everett parcel. The A. B. and C. parcel was included in this suit but, as The Northern Realty Company was made the sole defendant, that suit could not affect that parcel. The original condemnation suit of June, 1908, having been abandoned so far as these parcels are concerned, reliance must be placed solely upon the suit of January 20th, 1911, which appellant says was diligently prosecuted and at the time of the commencement of this proceeding was pending in the Supreme Court of the United States upon

writ of error from the Ohio Court of Appeals, which had decided it adversely to the defendant.

It now appears from the records of this Court that this sole remaining suit against The Northern Realty Company has been determined and plaintiff's right to appropriate the lands involved therein finally adjudicated against it.

While this last named appropriation suit was pending and as the bill avers, between January 31st, 1911, and February 24th, 1914, the steam power plant and hydro-electric plant were constructed on the premises in question through the expenditure of large sums of money therefor by the defendants. The Traction Company abandoned its other power houses for the new plants thus constructed, which it continued to extend and improve down to the commencement of this suit in August, 1916, expending large sums of money therefor and employing the power derived from these plants to the operation of its street and interurban railway systems. Plaintiff of course had full knowledge of the erection of these structures and their use by the defendant and the fact that large sums of money, to the extent of several millions of dollars, were being expended thereon. It took no action, however, to enjoin this use of the property by the defendant, but permitted it to go forward with these large expenditures, relying entirely upon its legal remedy through the prosecution of the appropriation suit which it had brought. It was not until its appropriation suit had been decided adversely to it in the highest court of the State that, in August, 1916, eight years after the adoption of its appropriating resolutions, after it had stood by and seen the expenditure of several million dollars in the improvement of this property, that the plaintiff seeks, by injunction, to acquire the lands which

it has failed or been unable to acquire through the ordinary process of legal appropriation.

Irrespective of what the doctrine may be with respect to the preferential right of the first locator as between rival companies seeking to appropriate for a public use, and irrespective of whether under this doctrine as contended for in appellant's brief, the plaintiff might, as a prior locating company, have in 1911, when these improvements were commenced, enjoined their construction and the use of the property therefor during the pendency of suits for their legal appropriation, nevertheless, we submit that, having stood by and seen these improvements go forward, involving the expenditure of large sums, the issuance of bonds and their sale to investors secured by mortgage upon the properties in question, it cannot now, when its legal suits have been allowed to lapse or been decided adversely to it, seek to litigate its rights in a court of equity and take away these valuable properties by the equitable process of injunction. If it has any rights under the facts set forth in its bill, these rights can be enforced by the ordinary legal proceedings provided therefor. If its rights are as it claims, it can condemn and appropriate these properties, but it ought not to be permitted at this late date to forestall such proceedings by attempting to acquire them in an equitable suit.

This situation makes applicable the language of Mr. Justice Clarke, then District Judge of the Northern District of Ohio, in deciding one of these cases brought by the Trustee of the Power Company's bond issue against the City of Akron, involving similar claims, the opinion appearing in the printed record in *Sears, Trustee, vs. City of Akron*, on file in this Court, from which we quote the following:

"* * * The Trustee whose rights cannot rise higher than those of the creditors he represents, did not begin this suit, until as we have said, within six days of the time when the city had announced that it was about to make use of the completed construction which must have cost a very large sum of money.

These facts must be taken into consideration when a chancellor is asked to enjoin a great public improvement, and by his order inconvenience the inhabitants of a city with approximately 100,000 inhabitants.

Such a state of facts makes sharply applicable the decision of the Supreme Court of United States in *New York City vs. Pine*, 185 U. S. 93, a case with many features not greatly different from the one at bar. Here the plaintiff sought to enjoin the city of New York from the use of the water of a river after it had expended a large sum of money in providing for use of such water. The court discussing elaborately the law applicable to such a state of facts, says:

'The time at which parties invoke the aid of a court of equity is often a significant factor in determining the extent of their rights. *Vigilantibus non dormientibus aequitas subvenit* is a maxim of equity.' (p. 98) * * * The court quotes with approval from *Smith vs. Clay*, 3 Brown Ch. 639, as follows:

'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence.' "

We submit that the situation thus disclosed by the bill cannot appeal to the conscience of the Chancellor to permit the invoking of the equitable remedy of injunc-

tion to deprive defendant of the use of its property and disturb the operation of a great street railroad system serving these populous communities.

CONCLUSION.

Plaintiff's case reduces to the proposition that by its incorporation under general laws and a mere resolution of its Board of Directors private owners of many miles of lands in the Cuyahoga River valley are divested of their property and prevented from using or improving the same.

It is averred that under certain legislation of the state the plaintiff took out its articles of incorporation and organized itself to construct a certain public improvement in a certain location. Granting, for the purpose of the argument, the broadest claim which plaintiff can make as to the effect of its franchise as giving it priority of right to appropriate property in the desired location, it is clear that these proceedings do not give it any title to privately owned lands in that location. They simply confer a potential prior right to procure such lands, but do not in themselves in anywise affect the titles of private owners to, or their right to make such use as they please of those lands until they are appropriated by legal process.

Granting further that the resolutions from time to time adopted by the Board of Directors of plaintiff were a preliminary step toward the appropriation of the lands desired, it is yet clear that these resolutions, joined with the prior proceedings, did not procure for the plaintiff the lands desired, nor divest their owners of the lands or the right to use them as they saw fit until such time as

the plaintiff should, in the manner provided by the laws of the state, appropriate these properties and become entitled to the possession of them.

It is equally clear, upon the averments of the complaint, that the plaintiff has never reached a point at which it completed appropriation proceedings and became entitled to the possession of the properties in question.

Until that time the appropriating company has only the potential right to appropriate, while, subject to that right, the owner of the legal title is entirely unhampered in his use of his own property. He may sell it, and the purchaser acquires all his rights. There is nothing which prevents the passage of legal title with all the rights appertaining thereto, subject always, however, to the hazard that the appropriating company may complete its proceedings and take the property from the owner.

It may be broadly conceded further, for the purposes of this argument, that no purchaser of property under those circumstances gets any better or higher rights than the original owner at the time the appropriation proceedings were begun, and that this defendant, therefore, now holds these properties subject to every potential right which the plaintiff, by its incorporation and subsequent procedure, acquired.

The bill avers that the defendant has built upon premises to which it has legal title, having purchased the same from the earlier owners thereof, a plant for generating electricity to operate its cars, a thing which according to its articles of incorporation it has full power to do. It is not claimed that it occupies, takes water from, or uses lands owned by anyone else.

We have here, then, the simple proposition that the legal owner of the lands, which have not been appro-

priated by the plaintiff or anyone else, is using them for an entirely lawful purpose. Moreover the bill avers, and for the purposes of the motion to dismiss it is admitted, that this use by the defendant is purely a private and not a public use. Indeed it is not averred in the bill that the defendant markets or sells any electrical energy whatever, the averment being that it simply uses it for propelling its own cars.

It may be broadly conceded, then, for the purposes of such motion, that the defendant acquired title to the properties in question and is using them subject to and at the hazard of all the rights acquired by the plaintiff in its incorporation proceedings and by reason of such steps, if any, as it has taken toward the appropriation thereof while said properties were in the hands of prior owners or in those of this defendant.

It must follow from this state of facts alleged in the bill that whenever the plaintiff completes its appropriation of these properties, by having damages therefor assessed, and pays the money into court, the defendant must retire and lose the benefit of all the construction it has placed thereon at its own hazard.

The bill of complaint clearly admits that the plaintiff has never reached this point, and that, therefore, it has acquired no actual right to the possession of these properties, or any of them, or to interfere with such use as their owner may be pleased to make of them.

This is the gist of the whole matter, and it would seem to present a proposition so simple and plain as to need no citation of authorities.

Of no possible materiality, therefore, can be the averments of the bill that the defendant claims, or is going to claim when the plaintiff attempts to appropriate, that its use of its own properties in generating its own

power is a public use which cannot be taken from it. This is not a moot court to try out in advance purely academic questions, nor can any claim which it is said the defendant will set up as a defense to such condemnation suit affect the facts admitted for the purpose of a demurrer to the bill, or the law applicable thereto. The pleading of such anticipated defense cannot confer equitable jurisdiction, nor can the averments of the bill as to the unconstitutionality of certain legislation of Ohio said to be involved in such claim become material or form the basis of federal jurisdiction.

Moreover in addition to these plain reasons showing an entire want of equity in the bill, there is the additional reason that the plaintiff, in reliance upon its legal remedy of condemnation, has stood by for many years while defendant has expended large sums in improving its properties and at this late date brings this proceeding to take from the defendant, by equitable process and without payment or tender of compensation, the property plainly recoverable in such legal action if the facts set forth in its bill are true.

Upon the averments of the bill it is not possible to imagine why the plaintiff is dodging the direct and open road which all this time has lain before it, and seeking, by some roundabout process, in this action as well as in the many others referred to in the briefs, to hamper and harass someone else instead of proceeding with its own business.

There is no reason apparent upon the face of this bill why the plaintiff may not and does not proceed to appropriate these properties by condemnation, unless it fears that the facts claimed by it are not true, or that its legal theories are untenable.

Respectfully submitted,

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